90-1253

No. _____

Supreme Court, U.S.
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In the SUPREME COURT of the UNITED STATES

October Term 1990

SUSAN J. FASSE and ELIZABETH FASSE,
PETITIONERS.

v.

PATRICIA HODGSON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF GEORGIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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ONE

QUESTIONS PRESENTED FOR REVIEW

A.

Drawn into question and validated in the State courts of Georgia, and the Georgia Supreme Court in these cases on November 7, 1990, is the state action of Georgia, as enacted and promulgated, by its compulsory, non-jury and non-binding Civil Arbitration Rule 1000 of the Fulton County, Superior Court, Atlanta Judicial Circuit, as being repugnant to the due process "notice" requirements and mandates of the 14th Amendment, Section 1, of the United States Constitution as has been decided and rigidly followed by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (70 SC 652) (1949); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (103 SC 2706) (1983) and *Tulsa Professional Collection Services, Inc. v.*

Pope, Executrix Of The Estate Of Pope, 485 U.S. 478 (1988), and other cases, where the only requirement for due process "notice" to the parties or their attorneys of an arbitration award, which adversely affects property interests, is that it be "published" and which publication is solely carried out by the posting of the arbitration award on a bulletin board located on the seventh (7th) floor of the court house, which area is secured with limited access allowed by and to the general public, and with one other copy of the arbitration award being kept in a file drawer of the private office of the court's Civil Arbitration Administrator. Pursuant to Civil Arbitration Rule 1000 of the Fulton County, Superior Court, Atlanta Judicial Circuit, in provision, promulgation and administration the arbitration award is

not mailed to the parties or their attorneys; is not personally served upon the parties or their attorneys; is not filed with the clerk of the Superior Court of Fulton County, Georgia; is not published in the county legal organ; is not published in a state wide legal organ, and then thirty (30) days after the seventh (7th) floor court house bulletin board "publication", of the so called "non-binding" and non-jury arbitration award, if the party whose property interests have been adversely affected has not filed a "trial de novo demand" pursuant to this lack of notice, with its risk of due process deprivation, a final judgment nisi prius is entered by the Superior Court against the citizen without notice of the judgment, either before the entry of the final judgment or after its entry. This is the practice and procedure irrespective of whether the

offended and affected party did or did not have an initial and timely pending demand for trial by jury on file.

Is this "state action" "publication" sufficient to meet the requirements and mandates of 14th Amendment due process "actual" notice and is it reasonably calculated to reach interested persons and is the forum chosen not substantially less likely to bring home notice than other of the feasible and customary substitutes?

B.

Drawn into question and valididate by the Georgia Supreme Court on November 7, 1990, is whether compulsory Civil Arbitration Rule 1000 of Fulton County, Superior Court, Atlanta Judicial Circuit, is unconstitutional as being repugnant to the 14th Amendment, Section 1, of the

United States Constitution guarantees of equal protection of the laws as against the State of Georgia's governmental action and regulation that is arbitrarily discriminatory in making unreasonable classifications between persons or groups of persons or classifications that are too vague?

TWO

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THREE

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THESE CASES BY OTHER COURTS

(a) None. (SEE: "Note" below.)

NOTE: The Georgia Supreme Court in these cases affirmed the offensive judgments against petitioners without opinion pursuant to its Rule 59. (A. 2) This was subsequent to the Georgia Supreme Court granting both of petitioners' Applications For Discretionary Appeal (A. 100, 102, 104, 109) pursuant to its Rule 25 and Official Code of Georgia (a/k/a: OCG & OCGA), section 5-6-35 on the grounds that (1) reversible error appears to exist; or (2) the establishment of a precedent is desirable (A. 101, 103) and with directions that petitioners [there "Appellants"] address in their briefs the questions, with which the *"Court is*

particularly concerned with" of:

"1) whether the motions to set aside should have been granted because the defendants did not have notice of the final judgments?"

"2) Whether the notice of award provisions of Fulton County Local Rule 1000 are sufficient?" (A. 100, 101, 102, 103)

FOUR

JURISDICTIONAL GROUNDS STATEMENT

The jurisdiction of this Court is invoked as follows:

(a) October 17, 1990 is the date of the entry by the Georgia Supreme Court of the judgments sought to be reviewed against the petitioners which affirmed without opinion the offensive judgments of the Superior Court of Fulton County, Georgia. (A. 2)

(b) November 7, 1990 is the date that the Georgia Supreme denied petitioners' timely filed Petitions For Rehearing (Motion For Reconsideration) pursuant to its Rule 47. (A. 1)

(c) November 14, 1990 is the date that the Georgia Supreme Court granted to petitioners a stay order from transmittal of the remittitur (pursuant to its Rule 61) so that an appeal or an application for certiorari could be filed in the

Supreme Court of the United States, which stay order is to remain in effect until final disposition by the United States Supreme Court. (A. 3, 4, 5)

(d) There are no extensions involved in these appeals.

(e) 28 USC 1257 (a) [*effect. 9-25-88 and repealing former 28 USC 1257 (b)*] and 28 USC 2101 (a) [United States Supreme Court Rule 13.1] are believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari. *SEE: End Note one (#1).*

FIVE

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THE CASES

14th Amendment, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws. (Emphasis added)

Local Rule 1000, paragraph [section], 14, Compulsory, non-binding, non-jury Arbitration Rule of Fulton County,

Superior Court (Atlanta, Georgia Judicial Circuit):

At the close of the arbitration hearing, the arbitrators shall confer and return a written award for one side or the other which shows the damages, if any awarded, and which shows any dissent. A simple majority of the arbitrators is required to return an award. The award is published to the parties, and the written award filed with the Court Administrator or his designee on the day of the hearing. No written findings of fact and conclusions of law are required. (Emphasis added) (A. 118, 119)

Local Rule 1000, Compulsory, non-binding, non-jury Arbitration Rule of Fulton County, Superior Court (Atlanta, Georgia Judicial Circuit):

All civil actions filed and seeking primarily money damages of twenty-five thousand dollars ($25,000.00) or less, or for damages in an unstated amount, shall be required to go through compulsory but non-binding arbitration. Any party to an action not otherwise qualifying may petition the Court that the case be scheduled for arbitration when it is not for the purpose of delay; the trial judge to whom the case has been assigned may order arbitration at any time at his or her discretion on any case whether or not it otherwise qualifies for arbitration; or the Court may, at its discretion, remove a case from arbitration or limit the issues to be arbitrated. (Emphasis added) (A. 212, 213 *for more lengthy text.*)

28 USC 1257 (a), *effective 9-25-88 and repealing former 28 USC 1257 (b):*

(b) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question of the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 USC 2101 (c) [United States Supreme Court Rule 13.1]:

(c) Any other appeal or any writ of certiorari intended to bring any judgment

or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

SIX

STATEMENT OF THE CASE

The federal questions sought to be reviewed on this appeal were raised by petitioners at the earliest possible time before the Georgia Supreme Court in their Applications For Discretionary Appeal (A. 104, 105, 109, 110) and their Enumeration of Errors (A. 7, 8, & 41, 43) and briefs (A. 10 & 45) to the Georgia Supreme Court, and at the earliest possible time, nisi prius, in the court of first instance, the Superior Court of Fulton County, Georgia, in their respective Motions To Set Aside Judgments (A. 115, 116 & 124, 132, 133, 134, 136), as follows:

> *"In promulgation and administration under the Fourteenth Amendment to the United States Constitution and the Constitution of Georgia, Fulton Superior Court Local*

Rule 1000 is unconstitutional in failing to guaranty substantive and procedural due process of law and in denying the equal protection of the laws as being governmental regulation and enactment that is "arbitrarily discriminatory" and vague." (A. 8, 43)

These cases began as landlord rent and tenant property collection actions in various courts in Fulton County, Georgia. Petitioner Elizabeth Fasse (hereinafter "petitioner Elizabeth" or "Elizabeth") sued respondent Patricia Hodgson (hereinafter "respondent Hodgson" or "Hodgson") her former tenant for rents due, damages to the demised estate and additional damages for alleged gross misconduct of respondent Hodgson during the time she leased petitioner

Elizabeth's home in Atlanta, Georgia.

Respondent Hodgson sued petitioner Susan Fasse (hereinafter "petitioner Susan" or "Susan") for the return of certain of her property which tenant respondent Hodgson allegedly left at petitioner Susan's home when she was a tenant there, and respondent Hodgson further claimed that she suffered damages in the nature of wounded feelings because Susan made her leave for not paying the rent.

Petitioner Susan then sued respondent Hodgson for less than one thousand dollars ($1,000.00), allowing credits for all just set offs, for rents allegedly owing her from Hodgson.

Petitioner Elizabeth is petitioner Susan's mother. This relationship is not other wise relevant, as the demised premises were separate pieces of improved real estate some distances apart in

Atlanta, and the petitioners' leases with respondent Hodgson were different contracts.

Through time and the judicial process all of these cases ended up in the Superior Court of Fulton County, Georgia and were consolidated as one by the trial judge on October 2, 1986 (A. 122) and long before these cases were severed, without notice, without requests from the parties or an opportunity to be heard, and referred for non-binding, compulsory and non-jury arbitration under new Fulton County Local Rule 1000 which had been implemented less than seven months before on March 1, 1986 by the Judges of the Superior Court sitting *en banc*, having been approved by the Georgia Supreme Court on October 23, 1985.

These consolidated cases requested damages far in excess of $25,000.00 and

demanded trial by jury.

After petitioner Susan's cases were referred for arbitration separately from petitioner Elizabeth's, although still consolidated as one in the Superior Court, petitioner Susan became very ill. As to the first arbitration setting of October 21, 1988 Susan filed her formal verified written Motion For Continuance with the affidavit exhibit of her treating medical doctor, John A. Shull, (A. 141, 143) showing that she was providentially prevented from attending the arbitration hearing and her counsel certified that he could not safely go to trial without her presence. (A. 141) The court granted the continuance until February 3, 1989. (A. 145) On January 30, 1989 petitioner Susan's conditions of ill being had worsened and she was again required to file through her attorneys Meier and Cassidy her verified written

Motion For Continuance, as before, with the January 30, 1989 affidavit exhibit of her treating physician, Dr. Shull, who explained that his patient, petitioner Susan, had undergone hospital inpatient surgery on December 2, 1988 and that a further medical consultant was being called into the case and that Susan would have to undergo further inpatient surgery *"within the next thirty to sixty days."*, and in the Doctor's opinion petitioner Susan was on January 30, 1989 *"permanently partially disabled and physically and medically unable to participate in any court proceeding until further notice"* from Dr. Shull. (A. 152)

Thereafter petitioner Susan in fact did undergo major inpatient surgery in Chattanooga, Tennessee on February 22, 1989 at Humana Hospital East Ridge while under general anesthesia in excess of

four hours (A. 178, 179) and as a result would be permanently and totally disabled for at least eight weeks and could not thereafter participate in any court proceedings until further notice from her doctors. (A. 180)

Petitioner Susan's January 30, 1989 written and verified Motion For Continuance with affidavit exhibits was personally served and filed upon and with the Clerk of the Superior Court, the Office of Civil Arbitration and opposing counsel on January 31, 1989 by Thomas V. Cassidy, one of Susan's attorneys, (A. 161, 162) and on Wednesday, February 1st, 1989 attorney Cassidy phoned the Fulton County Office of Civil Arbitration and was advised that petitioner Susan's written Motion For Continuance had been received on January 31st, 1989 and that the arbitration scheduled for Friday, February 3rd, 1989 had been continued and

would be reset to another date. (A. 162)

These foregoing facts are set out in some detail but are highly relevant when viewed against what subsequently occurred and measured against the high risk for due process deprivation when the United States Supreme Court minimum requirements for "actual" due process notice are not met.

Notwithstanding the above, the arbitration hearing went ahead on February 3rd, 1989 without petitioner Susan or her attorneys present and without their knowledge. An arbitration award was entered against Susan and in favor of respondent Hodgson in the amount of $51,181.25 plus $10,795.24 in attorney fees, although respondent Hodgson had never timely or properly under Georgia law requested attorney fees in her

pleadings in the Superior Court. (A. 167)

Pursuant to the provisions of, the administration of and promulgation of Fulton County Local Arbitration Rule 1000, and the practice of the Office of Civil Arbitration, no "actual" notice of this award by mailing or other service was ever given to Susan or her attorneys, although their whereabouts were actually known and "reasonably ascertainable". (A. 164) Had petitioner Susan or her attorneys been given due process "actual" notice a simple form "Demand For Trial De Novo" could have been completed and filed with the Office of Civil Arbitration within 30 days of the arbitration awards, and the cases arbitrated would have been once again restored to the Superior Court Fulton County jury trial calendar. (A. 212) Since no "actual" notice was given to petitioner Susan (A. 156) or her

attorneys (A. 159, 161) at any time and she was thus deprived of filing a demand de novo, respondent Hodgson's attorneys after the expiration of thirty (30) days and without notice either before entry or after entry prepared and had signed and entered on March 7th, 1989 a final judgment against petitioner Susan in the amount of the arbitration award. (A. 167) Between March 7th and June 20th, 1989 this judgment was not in the case file of the Clerk of the Superior Court of Fulton County. (A. 162, 163) So bizarre were the facts surrounding this missing judgment from the court's case file that the Clerk of the Superior Court set both petitioner Susan's and petitioner Elizabeth's cases on the April 11th, 1989 Superior Court's jury trial calendar, (A. 170), which prompted and necessitated on April 3rd, 1989 yet another verified and

written Motion For Continuance with attached medical doctor affidavits by Susan because of her on going pathologies and conditions of ill being. (A. 170, 171, 173, 174, 175,) At this point in time of April 3, 1989 the final judgments had been entered against Susan -- March 7, 1989, and petitioner Elizabeth almost a year before on June 6, 1988 (A. 167, 204) without petitioners, their attorneys and seemingly the Superior Court clerk's knowledge.

The facts surrounding the entry of the final judgment against petitioner Elizabeth on an arbitration award of April 1st, 1988 were exactly the same as those attendant to petitioner Susan with no "actual" due process notice of the arbitration award ever being served upon petitioner Elizabeth or her attorneys by mail or personal service when their whereabouts were actually known and

"reasonably ascertainable". In addition, in petitioner Elizabeth's case the record fails to disclose and in fact neither she or her attorneys received any notice of the rescheduled, after once postponed, arbitration hearing of April 1st, 1988. (A. 45, 46) More than thirty (30) days thereafter respondent Hodgson's attorneys without notice to petitioner Elizabeth or her attorneys either before entry or after entry had signed and entered on June 6, 1988, contrary to O.C.G.A., section 15-6-21(c), a final judgment against Elizabeth and in favor of Hodgson upon the April 1st, 1988 arbitration with an award of $5,000.00 of attorney fees which were never timely or properly requested or plead by respondent Hodgson in her pleadings in the Superior Court. (A. 45, 46, 47, 48 and 204) Petitioner Elizabeth's original case filed in the

Superior Court of Fulton County prayed for damages far in excess of the arbitration jurisdictional amount of $25,000.00 and demanded trial by jury.

The questions presented for review in petitioner Susan's and petitioner Elizabeth's appeals before this Court draw into question that same issues: that in promulgation and administration under the Fourteenth Amendment of the United States Constitution, Georgia Fulton Superior Court's, Atlanta Judicial Circuit, Local Rule 1000 is repugnant as being unconstitutional in failing to guaranty substantive and procedural "actual" notice due process of law and thus *"creates a high risk of erroneous due process deprivation"*, and in denying the equal protection of the laws as being governmental regulations and enactments that are "arbitrarily discriminatory" and vague. (A. 16, 43)

Notwithstanding anything else that may have or may not have occurred of a puzzling and unexplained nature in the courts below, the focus here is solely directed to the framework and parameters of the Fulton County, Georgia compulsory, non-binding and non-jury arbitration system in its enactment, promulgation and administration as to whether it meets this Court's minimum due process "actual" notice requirements or fails in doing so thus creating a high risk of due process deprivation which renders it unconstitutional. Further, and within the same focus, framework and parameters are the standards and provisions for the qualification of cases for compulsory arbitration so vague and arbitrarily discriminatory and capricious to render a citizen the loss of his 14th amendment guarantee of equal protection of the

laws. Especially so when coupled vis-a-vis with the failure of Local Rule 1000's due process "actual" notice guarantees.

FULTON COUNTY, SUPERIOR COURT, COMPULSORY, NON-BINDING AND NON-JURY LOCAL ARBITRATION RULE 1000:

How it works: as to the U.S. Constitution 14th amendment due process "actual" notice of an arbitration award which affects property interests.

The only provision for notice of an arbitration award to a party or his\her attorney contained in Local Rule 1000 provides in paragraph 14 that ***"the award is published to the parties, and the written award filed with the Court Administrator or his designee on the day of the hearing."*** (A. 118, 119) In practice, promulgation and administration this "publication" is carried out by posting the award on a bulletin board on the seventh (7th) floor of the Fulton

County court house which area is secured with limited access allowed to the general public, and a copy of the arbitration award is kept in the case file in the private office of the Arbitration Administrator also on the 7th floor of the same court house. The arbitration award is not mailed to the parties; is not mailed to counsel; is not served upon the parties or their counsel of record by the Sheriff's Department; is not published in the county organ and is not published in a Statewide legal organ.

The following uncontroverted July 31st, 1989 affidavit of Fulton County Superior Court Arbitration Administrator Kimberly A. Warden provides the best evidence, both real and direct, of this:

"AFFIDAVIT

GEORGIA, FULTON COUNTY

Personally appeared before me the undersigned authority duly authorized to administer oaths KIMBERLY A. WARDEN who after being sworn on oath deposes and states as follows:

That she is the Arbitration Administrator of the Office of Civil Arbitration, Fulton County Superior Court.

That Local Rule 1000 (14) of the Fulton Superior Court provides in part that the award (of the arbitrators) be published to the parties.

That the method by which the award of the arbitrators is published to the parties consists solely of:

(i) Posting such award on a

bulletin board outside the Court Administrator's Office of the seventh (7th) floor of the Fulton County Courthouse; and

(ii) Keeping a copy of same in the case file in the Office of Civil Arbitration and copies available for all parties;

(iii) That this has been the policy of the office for three years.

That the award of the arbitrators is not mailed to counsel of record or the parties in a case. That such award is not served on the parties or counsel of record by the Sheriff's Department.

That this Affidavit is given from personal knowledge and may be used for any lawful purpose.

This 31 day of July, 1989.

/s/ Kimberly A. Warden

Sworn to and subscribed
before me this 31st
day of July, 1989.

/s/ Myrtle J. Hunt
NOTARY PUBLIC

Notary Public, DeKalb, County, Georgia
My Commission Expires Nov. 17, 1990"

(Emphasis added) (A. 164, 165, 166)

The record is void as to whether even this defective court house 7th floor publication was carried out in these cases. It is not disputed that neither of the petitioners or their counsel of record received any notice of the arbitration awards, (A. 156, 159, 161) and in addition neither petitioner Elizabeth or her attorneys received notice of the rescheduled, once postponed, arbitration of April 1st, 1988. (A. 45, 46)

The Superior Court of Fulton County,

Georgia in its advertising to the general public and the legal community extending the invitation to use the arbitration system does not give the slightest hint or least suggestion that the procedure is anything but voluntary and non-binding and affirmatively represents that any judgment entered pursuant to an arbitration award is only final if all the parties and their counsel of record so consent. Not true! The advertisement also fails to disclose the high risks of due process "actual" notice and equal protection deprivation inherent in the promulgation and administration of the arbitration procedures. If this public dissemination had its source in the private sector it likely would subject the offender to severe governmental sanctions and penalties. (A. 212 thru 217)

If an arbitration award is not

objected to by a party or counsel within thirty (30) days after it is published by the filing of a "Demand For Trial De Novo" with the Arbitration Administrator's Office it becomes a final judgment of the Superior Court. (A. 119, 120) The only place this 30 day cautionary instruction is officially published is in the arbitration award itself. (A. 207, 208, 210, 211) Thus actual notice of the arbitration award is the very essence of a party's protection of his property right against its taking by an adverse judgment.

FULTON COUNTY, SUPERIOR COURT, COMPULSORY, NON-BINDING AND NON-JURY LOCAL ARBITRATION RULE 1000:

How it works: as to the U.S. Constitution 14th amendment guarantee of equal protection of the laws as imposing a limitation on the action of the States

as against government action or regulation that is "arbitrarily discriminatory" in making unreasonable classifications between persons or groups of persons or classifications that are too vague.

Local Arbitration Rule 1000 of Fulton County, Superior Court (Atlanta, Georgia Judicial Circuit) provides:

> "All civil actions filed and seeking primarily money damages of *twenty-five thousand dollars ($25,000.00) or less, or for damages in an unstated amount*, shall be required to go through *compulsory but non-binding* arbitration. . . . *the trial judge* to whom the case has been assigned *may order arbitration at any time at his or her discretion on any case whether or not it otherwise qualifies for arbitration* . . ." (Emphasis added) (A. 212,

213)

These classifications remove jurisdictional control of compulsory arbitration from the court and place it to the whims and artfulness of the pleader to ask for more than $25,000.00 and thus avoid arbitration, and on the other hand a case with a meritorious damage claim of many hundreds of thousands of dollars can on the vague and subjective whim of the trial judge be ordered to arbitration. "Going in" the litigant has no reasonable, non-vague and non-discriminatory criterion and benchmark in which to gauge the classification of his lawsuit.

The Fulton County Superior Court Local Rule 1000 arbitration program is presently unchanged and ongoing and being administered on a daily basis, as a part of the judicial process of the State of

Georgia, with its attendant high risks to due process "actual" notice and equal protection deprivations.

SEVEN

ARGUMENT

A.

On November 7, 1990 the State of Georgia's Supreme Court in these cases has decided a federal question regarding the U.S. Constitution 14th Amendment due process "actual" notice requirements in a way that conflicts with the decisions of this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (70 SC 652) (1949); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (103 SC 2706) (1983) and *Tulsa Professional Collection Services, Inc. v. Pope, Executrix Of The Estate Of Pope*, 485 U.S. 478 (1988) and other cases of this Court, to wit: *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) [*holding that a cause of action is a species of property protected by the 14th Amendment's Due Process Clause.*]; *United Savings Assn. of Texas v. Timbers*

of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) [*requiring actual notice in bankruptcy proceedings notwithstanding there is a need for prompt administration of claims.*]; *Greene v. Lindsay*, 456 U.S. 444 (1982) [*recognizing that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.*]; *Bank of Marin v. England*, 385 U.S. 99 (1966); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953) [*holding that Bankruptcy Code's requirement of "reasonable notice" requires "actual" notice of deadline for filing claims.*]; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) [*holding that actual notice necessary before termination of utility service.*]; *Schroeder v. City of New York*, 371 U.S. 208 (1962) [*holding that actual notice required in condemnation proceedings.*].

After granting to the petitioners leave for discretionary appeal to its court, the Supreme Court of Georgia ruled valid and constitutional its "State action" due process notice publication provision of the Superior Court of Fulton County, Georgia, Atlanta Judicial Circuit, compulsory, non-binding and non-jury arbitration Local Rule 1000 which only required that notice of an arbitration award, that could affect adversely a person's interest in his property, be published on a bulletin board on the seventh (7th) floor of the court house, which was a secured area with limited access allowed to the general public, and that another copy of the arbitration award be kept in a private office case file of the Civil Arbitration Administrator's office next to that same bulletin board on the same 7th floor of the same court house. The

Georgia Supreme Court ruled, without opinion, that the minimum requirements of 14th amendment due process "actual" notice did not mandate that a copy of the arbitration award be mailed to the parties or their counsel or personally served upon the parties or their counsel when their identity was known or "reasonably ascertainable" and when the results of the arbitration award was not to be published in the county legal organ nor a Statewide legal organ and when no other means to insure "actual" notice were either prescribed or to be undertaken. Local Arbitration Rule 1000 of the Superior Court of Fulton County was the Georgia Supreme Court's own enactment, it having been approved by that court on October 23, 1985, a little over five (5) years before entering its adverse judgment against petitioners,

without opinion. Here the Georgia Supreme Court was in effect ruling on the constitutional efficacy of it own judicial legislation.

Additionally, what makes the Georgia Supreme Court's action in these cases so perplexing and bizarre, is its track record of consistency through the years in striking down Georgia state statutes and enactments that did not follow the rationale and holdings of this Court in *Mullane,* supra, *Mennonite,* supra and *Tulsa*, supra, where there was drawn in question minimum 14th Amendment Due Process "actual" notice requirements. (SEE: A. 54 and 61 thru 80, and 85 thru 97)

As noted, through the years the Georgia Supreme Court has loyally invoked the stare decisis of its past rulings and holdings and purposefully followed its own prior judgments and opinions and

those of the United States Supreme Court on the requisite mandates and guidelines of *"bedrock"* due process "notice" and equal protection from its decision in *Jefferson Fire Insurance Company v. Brackin*, 140 Ga. 637 decided on October 2, 1913, to *Womble v. Commercial Credit Corporation*, 231 Ga. 569 decided on January 8, 1974, to *Thompson v. Lagerquist*, 232 Ga. 75 decided on April 4, 1974, to *Benton v. Modern Finance & Investment Company*, 244 Ga. 533 decided on October 25, 1979, to *Funderburke v. Kellett*, 257 Ga. 822 decided on February 12, 1988, through *Sun v. Jones*, 188 Ga. 552 decided on September 23, 1988.

In *Funderburke*, supra, pursuant to the guidelines of the United States Supreme Court in *Mennonite*, supra, it held a Georgia state statute unconstitutional as not being in accord

with the requirements of due process in only requiring notice publication at the court house and published notice in the county legal organ as to the rights of "a substantial interest in property" of the mortgagee of the property.

Again in ***Sun v. Jones***, supra, pursuant to the guidelines of this Court in ***Mullane***, supra, it held that the minimum requirement of Georgia state "action" for notice is met WITH the service by mail.

In ***Benton***, supra, relying once again on ***Mullane***, supra, and its own rulings in ***Thompson***, supra, and ***Womble***, supra, which both adopted ***Mullane***, supra, the Georgia high court held unconstitutional a state statute as violative of the due process clause of the 14th Amendment to the United States Constitution and as providing for notice not reasonably calculated to reach

interested persons or that the forum chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes, such as mailing.

Here petitioner Susan had an arbitration award by default entered against her in the amount of $61,976.49 plus interest after she had a few days before filed her conforming and legal motion for continuance, supported by the affidavit of her treating physician of her surgeries in Chattanooga, Tennessee, and her counsel was told by the Office of Arbitration that the arbitration had been continued, and then her only notice or that of her counsel of the entry of the default arbitration award in the amount of $61,976.49 plus interest was the alleged posting or "publishing" of it on a bulletin board on the seventh (7th)

floor of the courthouse, a highly secured area with limited access by and to the public, and a copy of the award kept in a desk drawer of the Administrator of the Office of Arbitration on the same limited access seventh (7th) floor of the same courthouse. Neither petitioner Susan or petitioner Elizabeth, who under the same circumstances had an arbitration award of $5000.00 dollars for attorney fees entered against her, received any other notice nor did their counsel, by service at their published of record addresses, either personally or by the usual and customary United States mail methods or any other known or "reasonably calculated" or accepted modes of notice or service "to reach interested parties." Thus the 30 day period expired in which petitioners could have easily cured the matter, but for the notice and service deficiency, by filing their Rule 1000

"Demand For Trial De Novo".

Thereafter, judgments on the default arbitration awards were entered without notice against both appellants, contrary to OCGA 15-6-21(c). It was in June 1989 only after a credit problem arose for petitioner Susan, due to all of this and for the first time in her life, and both petitioners having their bank accounts and savings and loan accounts taken by what only can be described as a hit-or-miss, non-investigatory and "scorched earth" march and siege through the financial community of Atlanta by the filing of over thirty (30) garnishment lawsuits against petitioners in the names of respondent Hodgson and her attorneys *as garnishment plaintiffs, that either of the petitioners or their counsel knew any thing of what had transpired. (R-297-301) (R-302-303) (A. 15) ***[*NOTE:***

respondent Hodgson's attorneys were never judgment creditors.] All of this occurred one (1) year and two (2) months after the offensive judgment had been entered against petitioner Elizabeth and ninety-five (95) days after the offensive judgment had been entered against petitioner Susan, and in the interim period and after the entry of these judgments the petitioners consolidated cases appeared on the April 11th, 1989 Fulton County Superior Court general jury trial calendar and the judgment against petitioner Susan was missing from the file of the clerk of the Superior Court. *(SEE: Statement Of The Case, ante.)*

Is the alleged posting, only, of the arbitration awards on a bulletin board on the seventh (7th) floor of a courthouse, which is secured with limited access to the general public, and the keeping of a copy of the arbitration awards in the

case file cabinet drawer of the private office of the Administrator of Civil Arbitration to which the public, the appellants and their attorneys have no access a practice of and notion of due process that leaves notice to chance and affords no reasonable probability that the petitioner will ever know of the action taken against them except by judgment executions that will deprive each of their property?

Under this state of the art of due process a citizen would be better off casting his lot with the town crier and his brass bell at 8:00 a.m., once a week, on the courthouse steps, or per Rudyard Kipling: ". . . *take one heap of all your winnings and risk them on one turn of 'pitch-and-toss'.*"

For purposes of 28 USC 1257 Fulton

County Superior Court, Atlanta Judicial Circuit, compulsory, non-binding, non-jury arbitration Local Rule No. 1000 is a "State statute" or state action, ***Reinman v. Little Rock, Ark.***, 237 U.S. 171 (1915); ***Sultan Ry. & Timber Co. v. Dept. Labor and Industries of State of Washington***, 277 U.S. 135 (1928); ***Tulsa***, supra, and the Georgia Supreme Court by its judgment order of November 7, 1990 has sustained the validity of Local Rule 1000 when it has been drawn in question on the ground that it is repugnant to the 14th Amendment of the United States Constitution. ***Goodyear Atomic Corp. v. Miller***, 486 U.S. 176 (1987) at page 178.

In view of these authorities by this Court and those discussed of the Georgia Supreme Court the judgments against petitioner Susan and petitioner Elizabeth cannot stand. The State of Georgia's

bulletin board "publication" does not measure up against this Court's minimum 14th amendment due process "actual" notice requirements as held in ***Tulsa***, ***Mullane*** and ***Mennonite***, supra, and is unconstitutional and when coupled with its vagueness and arbitrarily discriminatory unreasonable classifications amongst litigants and their law cases it creates a high risk for due process and equal protection deprivation.

The following examination of ***Tulsa***, supra, adequately covers this Court's reasoning and holdings in ***Mullane*** and ***Mennonite***, supra.

In ***Tulsa***, supra, this Court held the non-claim provision of the Oklahoma Probate Code unconstitutional as failing to require more than publication notice; and further held that state actions that

adversely affect property interests must be accompanied by such notice as is reasonable under the particular circumstances, which generally requires actual notice to an affected party whose name and address was known or "reasonably ascertainable" and the Due Process Clause of the 14th Amendment as interpreted by ***Mullane*** and ***Mennonite***, supra, requires that notice be given by mail or such other means as is certain to insure "actual" notice.

The 5th United States Court of appeals following and citing as controlling ***Mullane***, ***Mennonite*** and ***Tulsa***, supra, in ***Matthias v. Bingley***, 906 F.2d 1047 (5th Cir., 1990), a reasoned opinion, adopts ***Matthews v. Eldridge***, 424 U.S. 319, 321 (1976) and this Court's ***"risk of erroneous deprivation"*** test in holding unconstitutional certain city

ordinances which authorized the disposition of plaintiffs' property, that had been seized as potential evidence in unrelated criminal law enforcement investigations, without adequate 14th amendment due process "actual" notice to the known or reasonably ascertainable "lawful owners".

B.

"Equal protection" is a limitation imposed on the action of State governments by the 14th Amendment which means that State action cannot be "arbitrarily discriminatory" and only reasonable classifications and discriminations between persons or groups of persons are permitted. This is, also, true as to vagueness.

Local Arbitration Rule 1000 of Fulton County, Superior Court (Atlanta,

Georgia Judicial Circuit) provides:

> "All civil actions filed and seeking primarily money damages of *twenty-five thousand dollars ($25,000.00) or less, or for damages in an unstated amount,* shall be required to go through *compulsory but non-binding* arbitration. . . . *the trial judge* to whom the case has been assigned *may order arbitration at any time at his or her discretion on any case whether or not it otherwise qualifies for arbitration* . . . ." (Emphasis added) (A. 212, 213)

These classifications remove jurisdictional control of compulsory arbitration from the court and place it to the whims and artfulness of the pleader to ask for more than $25,000.00 and thus avoid arbitration, and on the other hand a case with a meritorious damage claim of many hundreds of thousands of dollars can on the vague and subjective whim of the trial judge be ordered to arbitration. "Going in" the litigant has no reasonable, non-vague and non-discriminatory criterion and

benchmark in which to gauge the classification of his lawsuit. This creates a high risk of erroneous deprivation as it fails to install any guidelines on the trial judge's exercise of his or her discretion for referral of a case *"whether or not it otherwise qualifies for arbitration."* SEE: *Vick Wo v. Hopkins*, 118 U.S. 589 (1886); *Kevishaian v. Board of Regents*, 386 U.S. 589 (1967); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) [*striking down section 12 of the Illinois Probate Act which allowed illegitimate children to inherit by intestate succession only from their mothers and which made other "vague" and "arbitrarily discriminatory" classifications between legitimate and illegitimate surviving children of a deceased for purposes of inheritance*]; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972) [*in determining the*

right to death benefits under Louisiana's Worker's Compensation Act as between legitimate and illegitimate surviving children of a decedent, who was killed out of and in the course of his employment, this Court required that, at a minimum, a statutory classification bear some relationship to a legitimate state purpose.] On this question of "equal protection" as the 5th Circuit Court of Appeals noted in ***Matthias***, supra, at page 1052:

> *Third, the ... ordinance ... creates a high risk of erroneous deprivation because it neither establishes nor incorporates any guidelines for satisfying its "good faith" requirement ... for ... locating "lawful owners." The ordinance allows each officer to decide when she [he] has satisfied the good faith requirement. Nothing in the system checks the officer's determination that she [he] cannot notify the owner or need not notify persons with colorable claims.* (Emphasis added)

Further and in relevant part, for

purposes of this discussion, Fulton Superior Court Local Rule 1000 provides:

> *3. The Court Administrator shall schedule and set dates for arbitration hearings . . . not less than 180 days subsequent to filing.* . . .

In contravention of such provision petitioner Susan's and petitioner Elizabeth's cases after being severed for arbitration by the trial court without notice, were first set for arbitration a year and one-half to two and one-half years "subsequent to their filing", which further constitutes a state action and administrative breach of the 14th amendment equal protection guaranteed to these two citizens of the State of Georgia and the United States of America.

CONCLUSION

As set forth above under FOUR: JURISDICTIONAL GROUNDS STATEMENT, (e) and End Note One (1), Petition page 12, if the Court finds that these appeals are appropriate pursuant to former 28 USC 1257 (b), it is prayed that the judgment of the Supreme Court of Georgia against petitioner Susan Fasse and petitioner Elizabeth Fasse be reversed as being premised upon state action which is unconstitutional as being repugnant to the 14th Amendment, Section 1, of the United States Constitution and that petitioners, and each of them, have judgment in their favor and against respondent Patricia Hodgson together with their respective costs and expenses of litigation; or otherwise that an order be entered by this court directing writs of certiorari to issue to the Supreme Court of the State of Georgia, and that

thereafter the judgment of the Supreme Court of Georgia against petitioner Susan Fasse and petitioner Elizabeth Fasse be reversed as being premised upon state action which is unconstitutional as being repugnant to the 14th Amendment, Section 1, of the United States Constitution and that petitioners, and each of them, have judgment in their favor and against respondent Patricia Hodgson together with their respective costs and expenses of litigation.

Respectfully Submitted:

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February 4, 1991
Atlanta, Georgia

END NOTES

1. The offensive judgment against petitioner Elizabeth Fasse was entered nisi prius by the Superior Court of Fulton County, Georgia on March 6, 1988 (A. 204) which is prior to the amendatory effective date of new 28 USC 1257 (a) [effective date September 25, 1988]. Section 7 of the Supreme Court Selections Act (Public Law 100-352) provides that the amendments do not apply to cases pending in the U.S. Supreme Court on the effective date, or to any judgment of a court "entered" before the effective date of September 25, 1988. Counsel for petitioners has interpreted this to mean the judgments of a highest State court of resort, and not the entry of "any" judgment in a State's lower court. The Georgia Supreme Court judgments against petitioners were entered on October 17, 1990, which was over two (2) years after the effective date of new 28 USC 1257 (a). For this reason counsel for petitioner Susan and petitioner Elizabeth has proceeded under new 28 USC 1257 (a) and presents these petitioners' cases to this Court as applications for writs of certiorari. If counsel's assumption in this regard, and after skillful and diligent legal research and investigation, is in good faith mistakenly taken from the decision of the highest court of the State of Georgia, it is requested that petitioner Susan's and petitioner Elizabeth's appeals be regarded as "direct" appeals pursuant to former 28 USC 1257 (b), where there has been drawn into question the validity of a statute or State action of the State of Georgia on the grounds of its being repugnant to the Constitution of the

United States, and the decision was in favor of its validity, and that petitioners' application for writ of certiorari be regarded as their BRIEF ON THE MERITS pursuant to this Court's rule 25. Trusting this pleases the Honorable Court, it is respectfully submitted: Thomas V. Cassidy, attorney for petitioners.